No. 12560

IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

F. E. NEMEC,
Appellant,

UNITED STATES OF AMERICA,
Appellee.

No. 12560

On Appeal from the District Court of the United States, for the Eastern District of Washington

BRIEF FOR THE APPELLEE

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STATEMENT OF JURISDICTION

The Circuit Court of Appeals has jurisdiction of the instant case under the provisions of Title 28, Sections 1291 and 2255, United States Code.

STATEMENT OF THE CASE

On or about July 2, 1948, the appellant F. E. Nemec was convicted by jury in the District Court of the United States for the Eastern District of Washington, Northern Division, on four counts of criminal violations against the United States. The gist of the four

counts was that the appellant Nemec, and others, had defrauded numerous Washington investors by the sale of mining claims in California through false and fraudulent representations and promises.

Appellant Nemec was sentenced on July 2, 1948, to a term of two years on Count I, the conspiracy count; a term of one year on Count II, the mail fraud count; a term of one year on Count IV, a Securities and Exchange Act count; and a term of one year on Count V, a Securities and Exchange Act count. Imprisonment on Counts I, II, and IV to run consecutively—a total of four years; imprisonment on Count V to run concurrently with the sentences on the other counts.

Appellant Nemec appealed his conviction to the United States Circuit Court of Appeals for the Ninth Circuit. By opinion dated December 14, 1949, in case No. 11975, the Circuit Court affirmed his conviction. The opinion of the Court is reported in 178 F. (2d), No. 4, Page 656.

On or about February 13, 1950, the appellant filed a Petition for Writ of Certiorari to the United States Supreme Court to review the judgment of conviction after his petition for rehearing to the Circut Court of Appeals was denied. Appellee has now been informed that appellant's Petition for Writ of Certiorari was denied on June 5, 1950. The mandate has not yet been returned to the District Court for the Eastern District of Washington.

On or about February 27, 1950, the appellant filed with the Clerk of the District Court for the Eastern District of Washington at Spokane a Motion to Vacate

Judgment and Sentence. On March 9, 1950 (Tr. 12) the Honorable Sam M. Driver, Judge of the above District Court, denied said motion on the ground that, since the mandate in the earlier appeal had not yet been received from the Circuit Court of Appeals, the Court had no jurisdiction to entertain said motion (Tr. 19). It is from this order that the appellant is taking his present appeal.

APPELLANT NEMEC'S ASSIGNMENT OF ERROR

Appellant sets forth a number of points of alleged error, most of which were already once disposed of in his previous appeal wherein his conviction was affirmed. From a reading of his brief, it would appear that he now urges two assignments of error. These two assignments of error, together with the argument of appellee, are:

ARGUMENT

1. Answer to appellant Nemec's assignment of error that the District Court was in error in denying appellant's Motion to Vacate Judgment and Sentence on the ground that while the case was still pending on appeal the Court was without jurisdiction.

As hereinbefore stated, the appellant Nemec filed his Motion to Vacate Judgment and Sentence in the District Court on or about February 27, 1950. At the time of the filing of that motion his earlier appeal from his conviction was still pending before the United States Supreme Court on his petition for Writ of Certiorari.

As hereinbefore stated, the United States Supreme Court did not deny the writ until June 5, 1950. The Clerk of the District Court still has not received the mandate in this cause from the Circuit Court of Appeals. Such being the case, it is the position of the appellee that the Court was entirely correct in determining that he had no jurisdiction until the appeal had been finally consummated and the mandate returned to the District Court.

The rule is well set forth in Corpus Juris Secundum, Vol. 4, Appeal and Error, Par. 607, Page 1091:

> "The perfection of the appellate proceedings, and consequent transfer of jurisdiction vests the appellate court, with exclusive power over the subject matter of the proceedings, and suspends the power of the lower court with reference thereto, although it retains power to do anything necessary to the presentation of the case in the appellate court."

The rule is also well stated in *Berman v. United States,* 302 U. S. 211, 214:

> "As the first sentence was a final judgment and appeal therefrom was properly taken, the District Court was without jurisdiction during the pendency of that appeal to modify its judgment by resentencing the prisoner."

The filing of a Writ of Error with the Circuit Court removing the cause was held to deprive the District Court of any further jurisdiction in *Spirou v. United States,* 24 F. (2d) 796, 797.

The position of appellee is supported by the Federal Rules of Criminal Procedure. Rule 39 (a) of the Rules provides:

> "The supervision and control of the proceedings on appeal shall be in the appellate court from the time the motion of appeal is filed with its clerk, except as otherwise provided in these rules."

Rules 39(c) and 46(a)(2) indicate that after a motion of appeal is filed the trial court loses jurisdiction with but two exceptions: (1) for the extension of time for filing and docketing the appeal (Appendix), and, (2) for the allowance of bail bond pending appeal (Appendix). Obviously the motion herein directed to the trial court does not come within either exception.

Rule 33 of the Federal Rules of Criminal Procedure, providing for new trials, significantly states that "if an appeal is pending the court may grant the motion only on remand of the case."

It is appellee's position that the motion of the appellant to vacate judgment and sentence was premature.

> 2. Answer to appellant Nemec's assignment of error—that he was twice convicted and sentenced on the same offense, inasmuch as the conspiracy count and the substantive counts of the indictment allege substantially the same offense and intent and were supported by the same evidence.

It is urged by the appellee that this appeal should be restricted to the one question involved: whether or not the trial court had jurisdiction to hear appellant's Motion to Vacate Judgment and Sentence. Appellant's above assignment of error was listed by him as a ground of appeal in his notice of appeal filed upon his criminal conviction. The question of double jeopardy was rightfully a matter for argument on the appeal of his conviction, not here.

In any case, however, the aforesaid assignment of error has no merit. It is well established that conspiracy is a crime separate from substantive crimes and may be prosecuted with the latter. *United States v. Freeman,* 167 F. (2d) 786.

The position of the appellant is well answered in *Pinkerton v. United States,* 328 U. S. 640, at 643, wherein it was stated:

> "It has been long and consistently recognized by the court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established."

A conviction for the conspiracy may be had, though the substantive offense was completed. *Heike v. United States,* 227 U. S. 131, 144. And the plea of double jeopardy is no defense to a conviction for both offenses. *Carter v. McClaughry,* 183 U. S. 365, 395. Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive counts. As stated in *Sneed v. United States,* 298 Fed., 911, at 913:

> "If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it."

In *Holmes v. United States,* 134 F. (2d) 125, cert. denied, 319 U. S. 776, the court pointed out that a defendant could not complain of a conviction of violating a Securities Exchange Act and of using the mails to defraud, embraced in several counts, and of conspiracy to effect the scheme to defraud embodied in such counts,

on grounds that through the conspiracy count he was twice convicted of the same offense, since conspiracy was a different offense from that charged in the other counts.

CONCLUSION

Appellee respectfully urges that the trial court committed no error in denying appellant's Motion to Vacate Judgment and Sentence on the basis that the court had no jurisdiction while his earlier conviction was on appeal and the mandate unreturned.

Appellee further respectfully urges that in any case appellant has not been subjected in his conviction and sentencing on a conspiracy count and several substantive counts to double jeopardy.

The appellee respectfully prays that the petition of appellant Nemec be denied.

Respectfully submitted,

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APPENDIX

Federal Rules of Criminal Procedure

Rule 39. Supervision of Appeal

(c) Docketing of Appeal and Record on Appeal. The record on appeal shall be filed with the appellate court and the proceeding there docketed within 40 days from the date the notice of appeal is filed in the district court, but if more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date the first notice of appeal is filed. In all cases the district court or the appellate court or, if the appellate court is not in session, any judge thereof may for cause shown extend the time for filing and docketing.

Rule 46. Bail

(a) (2) Upon Review. Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice. The court or the judge or justice allowing bail may at any time revoke the order admitting the defendant to bail.